Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

NO. 76-1208

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Offender
Rehabilitation,

Petitioner,

vs.

NATHANIEL PRESSLEY,

Respondent.

* * * * * * * * * * * * * *

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * * * * * * * * * * * * *

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NO.

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NATHANIEL PRESSLEY,

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioner, LOUIE L. WAINWRIGHT, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered on October 15, 1976.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit appears

in the Appendix hereto, and is reported at 540 F.2d 818.

JURISDICTION

The opinion of the United States Court of Appeal was entered on October 15, 1976. A petition for rehearing or rehearing en banc was timely filed. Said petition was denied on November 22, 1976. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

WHETHER COURT APPOINTED COUNSEL'S FAILURE TO OBTAIN POST APPELLATE DISCRETIONARY REVIEW CONSTITUTES A DEPRIVATION OF A FEDERAL CONSTITUTIONAL RIGHT SO AS TO JUSTIFY THE GRANTING OF HABEAS CORPUS RELIEF?

STATEMENT OF THE CASE

Respondent and Andre Rhymes were indicted for the crime of murder in the first degree. (R. 24). A joint trial by a jury, resulted in the conviction of both defendants and imposition of sentences of life imprisonment. (R. 25). Pressley and Rhymes filed separate appeals (consolidated for argument) in the District Court of Appeal, Third District, which affirmed both convictions. Pressley v. State, 261 So.2d 522 (Fla. 3d DCA 1972) and Rhymes v. State, 261 So.2d 527 (Fla. 3d DCA 1972).

Rhymes' counsel thereafter filed a petition for writ of certiorari in the Florida Supreme Court which was denied. Rhymes v. State, 268 So.2d 535 (Fla. 1972). Pressley's counsel declined to file a petition for writ of certiorari but suggested that the

public defender be contacted. Pressley wrote a letter dated May 31, 1972, (no date is shown to indicate when the letter was received) to the public defender asking for such assistance. (R. 36). On June 28, 1972, a Stipulation and Motion to Substitute Counsel was filed (R. 37 and 38) and on July 3, 1972, the public defender was appointed. (R. 39).

The public defender thereafter filed a petition for writ of habeas corpus in the Supreme Court of Florida which was denied. Pressley v. Wainwright, Fla. Case No. 42,684, decided November 28, 1972. (R. 43). A petition for writ of habeas corpus was later filed in the United States District Court, Southern District of Florida, which denied relief. Pressley v. Wainwright, Case No. 73-737-CIV-JE, Order Dismissing Petition filed June 27, 1973. Appeal was

taken to the court of appeal which affirmed the dismissal on grounds of lack of exhaustion of state remedies. Pressley v. Wainwright, 493 F.2d 894 (5th Cir. 1974).

The public defender filed, in the Supreme Court of Florida, a Motion for Leave to File Belated Application for Certiorari, which was denied. Pressley v. Wainwright, Fla. Case No. 42,684, Order, July 22, 1974. (R. 48). Habeas corpus was again applied for in the United States District Court (R. 1-7) which granted relief. (R. 116-118). Petitioner then appealed to the court of appeal, which rendered the opinion giving rise to the instant petition.

REASON FOR GRANTING THE WRIT

The Decision Below Is In Conflict With The Decision Of This Court In Ross v. Moffitt, 417 U.S. 600 (1974).

In Ross v. Moffitt, supra, this Court was faced with the question of whether an indigent defendant who has been convicted of a crime, had a constitutional right to the appointment of counsel for the purpose of seeking post appeal, discretionary review in the State Supreme Court (and in this Court). Moffitt was represented by appointed counsel at trial and on direct appeal to the North Carolina Court of Appeal. After the appeals court affirmed the conviction, instead of filing a petition for writ of certiorari to the North Carolina Supreme Court, Moffitt's court-appointed counsel approached the lower court about possible appointment to represent Moffitt, and was denied. This Court considered and rejected the contention that either the Due Process Clause or the Equal Protection Clause of the

Fourteenth Amendment required that a state provide counsel for indigent defendants seeking discretionary appeals to the State Supreme Court. Accordingly, this Court held that Moffitt "was denied no rights secured by the Federal Constitution when North Carolina refused to provide counsel to aid him in obtaining discretionary appellate review." Id. at 417 U.S. 619.

The decision of the court of appeal below attempts to distinguish Ross v. Moffitt by pointing out that Moffitt's counsel was denied permission to represent Moffitt in the Supreme Court of North Carolina, whereas in the instant cause, the substitution of counsel was granted. Petitioner submits, however, that this difference creates no distinction at all.

While the Motion to Substitute Counsel

(R. 37) and Stipulation attached thereto (R. 38) indicate that the request for the substitution was for the purpose of filing a petition for a writ of certiorari in the Supreme Court of Florida, the Order approving the substitution (R. 39), could not and did not specify that the substitution was for that purpose. The substitution of counsel could have no effect on the filing of a petition for certiorari, since the time for filing had already expired four days prior to the making of the motion to substitute counsel. Hence, the order of the District Court of Appeal simply indicated that the Public Defender of Dade County is substituted as counsel of record, presumably, to seek whatever relief was then available, such as a motion to mitigate pursuant to Rule 3.800(b) Fla. R.Crim.P.

Moffitt's court-appointed counsel was unable to secure permission to file a petition for a writ of certiorari, although he took affirmative steps in an attempt to do so. Respondent's counsel was likewise unsuccessful. In neither instance was the accused deprived of any rights secured by the United States Constitution. The Florida courts have indicated that appointed counsel has discharged his and the State's constitutional duty when the right of review by means of direct appeal has been completed. see Cox v. State, 320 So.2d 449 (Fla. 4th DCA 1975); see also, Rhome v. State, 293 So.2d 761 (Fla. 3d DCA 1974). Accordingly, relying on Ross v. Moffitt, the lower federal courts have held that neither the failure of appointed counsel to advise his client of his right to seek post direct appellate review, nor the failure of

counsel to seek that review, presents a claim of constitutional magnitude, justifying habeas corpus relief. Morgan v. Yancy County Department of Corrections, 527 F.2d 1004 (4th Cir. 1975); United States ex rel. Cadogan v. LaVallee, 502 F.2d 824 (2d Cir. 1974); Ardister v. Hopper, 500 F.2d 229 (5th Cir. 1974).

Mr. Engel received no life time appointment. He was appointed solely for the purpose of representing respondent on his direct appeal. (R. 26). That appointment terminated simultaneously with the rendering of the order of the District Court of Appeal, denying a petition for rehearing. (R. 35). Respondent had no right under the State or Federal Constitution to expect that counsel would automatically be appointed to represent him in any discretionary or post-conviction

application. Ross v. Moffitt, supra; Hooks v. State, 253 So.2d 424 (Fla. 1971). Pressley is shown, by his letter to Mr. Hubbart, to clearly know that Mr. Engel would not continue to represent him. (R. 36).

There is no allegation that Pressley made known (during the time for the filing of a petition for certiorari) to either the District Court of Appeal or the Florida Supreme Court, any suggestion of a desire to have new counsel appointed for the purpose of filing a petition in the Supreme Court. To hold that a defendant is entitled to expect any legal service from one who he knows not to be his legal counsel is simply to ignore the realities of everyday life. The public defender's office simply cannot be faulted for having failed to file a petition for a writ of certiorari on behalf of one who was not a

client, and did not become a client until July 3, 1973 (R. 39), after the time had expired for the taking of a petition for certiorari.

Yet even were it to be assumed that either the original counsel or the public defender did not render completely effective assistance to the respondent, is habeas corpus relief proper? Petitioner submits not. The scope of habeas corpus is limited to a review for violations of federal constitutional standards. Milton v. Wainwright, 407 U.S. 371 (1972). It is not the function of the federal court sitting in habeas corpus to search for the "achilles heel" in every state court proceeding. Nees v. Culbertson, 406 F.2d 621 (5th Cir. 1969). Accordingly, a showing of ineffectiveness which does not amount to a failure of constitutional magnitude

does not justify habeas corpus relief. United States ex rel. Marcelin v. Mancusi, 462 F.2d 36 (2d Cir. 1972).

The failure of the public defender or Mr. Engel as appointed counsel, to secure permission to file a petition for a writ of certiorari is no more or less ineffective representation of counsel than was the failure of Moffitt's appointed counsel to secure similar relief for his non client. The loss of the right to take a discretionary appeal, i.e., a petition for certiorari, does not deprive respondent of any federal constitutional right, Ross v. Moffitt, supra; Cadogan v. LaVallee, supra, so as to justify the granting of habeas corpus relief.

CONCLUSION

Because of the importance of the question presented and because of the conflict between the decision of the court below and the decision of this Court in Ross v. Moffitt, supra, it is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,

ROBERT L. SHEVIN
Attorney General

JOEL D. ROSENBLATT
Assistant Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Writ of Certiorari was furnished by mail to the HONORABLE BENNETT BRUMMER, Public Defender, 11th Judicial Circuit of Florida, 1351 N. W. 12th Street, Miami, Florida 33125, this_____day of February, 1977.

ROBERT L. SHEVIN
Attorney General

JOEL D. ROSENBLATT
Assistant Attorney General

APPENDIX

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Fifth Circuit Case No. 75-3861,
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Nathaniel PRESSLEY,
Petitioner-Appellee,

v.

Louie L. WAINWRIGHT, Secretary, Department of Offender Rehabilitation,
Respondent-Appellant.

No. 75-3861
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

Oct. 15, 1976.

Florida prisoner petitioned for federal habeas corpus relief. The United States District Court for the Southern District of Florida, at Miami, Joe Eaton, J., entered a judgment conditionally granting writ and the State of Florida appealed. The Court of Appeals, Brown, Chief Judge, held, inter alia, that indigent prisoner's right to petition for writ of certiorari to Florida Supreme Court was frustrated because he was denied effective assistance of counsel when court-appointed counsel informed prisoner of the termination of relationship and prisoner then requested, within time to petition for certiorari from the affirmance of his conviction by the Florida District Court of Appeal, for representation by public defender but substitution was of counsel was not timely made.

Affirmed.

1. Criminal Law ⇐641.13(7)
Habeas Corpus ⇐112

Where indigent Florida prisoner after denial of request for a rehearing on decision of Florida District Court of Appeals affirming his conviction received letter from court-appointed counsel stating that he should request public defender to represent him for any future review and prisoner made timely request for representation by public defender but substitution of counsel was not made until after expiration of the 30-day limit for petition for certiorari, prisoner's right to petition for certiorari was frustrated by denial of effective assistance of counsel and federal district court, on petition for writ of habeas corpus, properly required Florida to either allow belated application for certiorari or to set aside conviction and grant new trial. 32 West's F.S.A. Florida Appellate Rules, rule 4.5, subd. c(6).

2. Attorney and Client ⇐112

Attorney who agrees to undertake task of petitioning Florida Supreme Court for writ of certiorari makes a hollow commitment when he does not exercise care to preserve that right. 32 West's F.S.A. Florida Appellate Rules, rule 4.5, subd. c(6); 32 West's F.S.A. Code of Ethics, rule B, §§ 1 et seq., 1, subds. 4, 44.

3. Habeas Corpus ⇐45.2(1)

Failure of either court-appointed counsel, seeking to terminate attorney-client relationship with prisoner following affirmance of his conviction by Florida District Court of Appeals, or public defender, requested by prisoner to obtain review by Florida Supreme Court by certiorari, or both to make timely petition for certiorari was sufficient state action to authorize federal habeas corpus relief with respect to state prisoner. 32 West's

* Rule 18, 5 Cir.; see *Isbell Enterprises, Inc. v. Citizens Casualty Company of New York et al.*, 5 Cir., 1970, 431 F.2d 409, Part I.

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F.S.A. Florida Appellate Rules, rule 4.5, subd. c(6); 32 West's F.S.A. Code of Ethics, rule B, §§ 1 et seq., 1, subds. 4, 44.

4. Courts ⇐281

Federal courts will not consider a case of controversy of nonconcrete or hypothetical nature and it must be a real and substantial controversy admitting of specific relief through decree of conclusive character, as distinguished from an opinion advising what law would be upon a hypothetical state of facts.

5. Attorney and Client ⇐166

Attorney's duty to client does not necessarily and immediately end or begin with discrete formality of a letter or motion, and somewhat more passive, yet affirmative, duties may remain or arise over the client representation continuum when there is possible prejudice to a prisoner's case.

Appeal from the United States District Court for the Southern District of Florida.

Before BROWN, Chief Judge, and GEWIN and MORGAN, Circuit Judges.

JOHN R. BROWN, Chief Judge:

Once more Nathaniel Pressley's case comes before this Court for review of the District Court's disposition of this prisoner's petition for a writ of habeas corpus.[1] This time we affirm the District Court's conditional grant of a writ order.[2]

[1] In succinct fashion, Prisoner was convicted in Florida of first degree murder. Because of his impecunious nature, Prisoner had court-appointed counsel for his direct appeal to the District Court of Appeals, Third District, which by a split panel affirmed the conviction.[3] Under Florida Appellate Rule 4.5[c][6], 32 F.S.A., to preserve review by the Florida Supreme Court, Prisoner had to file a petition for certiorari within thirty days of rendition of the applicable order, decision, or judgment of the District Court of Appeals. For Prisoner's certiorari petition, May 24, 1972, the date his motion for rehearing before the Florida District Court of Appeals was denied, is the relevant date under Rule 4.5[c][6].

On May 31, only seven days after the rehearing denial, Prisoner received a letter from his court-appointed counsel which informed him that he should request the Public Defender for Dade County to represent him for any future review and that the court-appointed counsel would no longer represent him.[4] On the same day, Prisoner wrote to the Public Defender requesting representation. His request was favorably received, but representation was conditioned to begin from the time that the Public Defender would be properly substituted as counsel. Between the time from denial of the rehearing motion, May 24, and the date on which Prisoner received notice that he should request other counsel to represent him for certiorari purposes, May 31, the same day that he made such a request to the Public Defender, only seven calendar days had passed—well within the thirty day limit imposed by Rule 4.5[c][6], Fla.App.Rules, 32 F.S.A. Not until June 28, 1972, was the substitution motion filed with the Florida District Court of Appeals and the motion was not granted until July 3. Both actions were outside the thirty day limit.[5]

[2, 3] Despite the record's silence regarding the reason for failure to file the motion for substitution and, more importantly, to protect Prisoner's right to *seek* certiorari, decision of this dispute does not rest with this silence or with an awakening burst of explanations that have not come forth. The mere failure to act is sufficient. Clearly, Prisoner timely indicated his intention to seek review by the Florida Supreme Court. Within the fateful deadline imposed by Rule 4.5[c][6], both the court-appointed counsel and the Public Defender were cognizant of Prisoner's desire and the time constraint. In contrast, Prisoner was unaware of this filing time and was relying on the respective attorneys to complete the substitution of counsel and to protect his right to request a writ of certiorari.[6]

From this background, the state's brief creates an argument using as its

1. Prior to this appeal by the State of Florida, Prisoner had sought habeas relief after indirect denial—mere refusal to release Prisoner—by the Florida Supreme Court on November 28, 1972, of his writ of habeas corpus requesting to file "a belated petition for certiorari". *Pressley v. Wainwright*, Fla., 1972, No. 42,684. The Prisoner proceeded to petition the federal court system for a similar writ. This petition was dismissed on the merits by the District Court. *Pressley v. Wainwright*, S.D.Fla., 1973, No. 73-737-CIV-JE. This Court in *Pressley v. Wainwright*, 5 Cir., 1974, 493 F.2d 894, affirmed the dismissal based on Prisoner's failure to exhaust state remedies. In light of our opinion and subsequent to it, counsel for Prisoner filed before the Florida Supreme Court a motion for leave to file a belated petition for certiorari. By an unilluminating order the Florida Court stated: "The motion for leave to file belated application for certiorari filed by counsel for Nathaniel Pressley is denied." *Pressley v. Wainwright*, Fla., 1974, No. 42,684. On March 19, 1975, Prisoner returned to the Southern District of Florida seeking habeas relief. In its order of June 30, 1975, the District Court found that the Prisoner had exhausted his state remedies and conditionally granted the writ. *Pressley v. Wainwright*, S.D.Fla., 1975, No. 75-420-CIV-JE. From this order, Florida appeals.

2. The order requires the State of Florida either to allow a belated application for certiorari or to set aside the conviction and grant a new trial within a reasonable time. Under the order Florida has the option to follow either one of these alternatives.

3. *Pressley v. State*, Fla.App.3d, 1972, 261 So.2d 522.

4. The record does not indicate whether Prisoner had previously requested that his court-appointed counsel represent him for certiorari purposes and that his attorney *at that instant* responded with the May 31 letter. Nor does the record indicate whether the court-appointed counsel's letter was self-initiated with the two-fold purpose of informing Prisoner of his right to seek review by certiorari and the termination of their client-attorney relationship for purposes of seeking such review. This Court's opinion in *Pressley v. Wainwright*, 5 Cir., 1974, 493 F.2d at 895, however, indicates that the court-appointed counsel was aware of Prisoner's desire prior to the May 31 letter.

5. Again, the record is conspicuously absent any factors elucidating the reason—or lack of—for this delay.

6. This Court does not address the question of which attorney or attorneys bore the responsibility to timely complete the substitution of counsel, to protect Prisoner's right to seek review of his conviction, or both. During the time this case was before the Florida Courts, the Code of Ethics, Rule B, 32 F.S.A. regulated practice of attorneys in Florida. This Code promulgated by the Florida Supreme Court indicates that counsel for an indigent prisoner should "*always* exert his best efforts in his [client's] behalf" and that an attorney should not withdraw from representation of the unfinished task ". . . to the detriment of his client except for reasons of honor or self-respect." See Fla.Code of Ethics, Rule B subd. 4, subd. 44, 32 F.S.A. Similarly, one who agrees to undertake the task of petitioning the Florida Supreme Court for a writ of certiorari makes a hollow commitment when he does not exercise care to preserve that right. From training and reason, the parameter of a vigilant lawyer's responsibility is apparent.

In all events, failure of either or both was state action sufficient under *Fitzgerald v. Estelle*, 5 Cir., 1974, 505 F.2d 1334 (en banc), overruling, 1973, 479 F.2d 420.

base *Ross v. Moffitt*,[7] in which the Supreme Court held that Moffitt ". . . was denied no rights secured by the Federal Constitution when North Carolina refused to provide counsel to aid him in obtaining discretionary appellate review." The keystone of this argument is the statement that "*if*" Prisoner's motion to substitute counsel had been denied, he would have been in the same situation as Moffitt. With these two structural points identified, the construction of the state's theory proceeds by arguing that no later than from the time Prisoner received notice of his court-appointed counsel's intention to withdraw from further representation, May 31, until the completed substitution of counsel on July 3, Prisoner was without an attorney. As a consequence, regardless of the substitution of counsel motion on June 28, Prisoner's predicament is identical to Moffitt's: he was without counsel during the filing time and no duty to appoint counsel existed on the state of Florida for discretionary review.[8]

[4, 5] As an arch falling when its keystone is removed, likewise, the State's argument fails. Because Prisoner's motion to substitute was granted, the binding together factor of this argument is nonexistent.[9] Furthermore, the base of the argument gives way under close scrutiny. No issue regarding failure to provide discretionary review exists. The record indicates that Prisoner's court-appointed attorney recommended that he ask the Public Defender to undertake his representation *and* that the Public Defender agreed to do so *within the thirty-day period in question*. Realization of these two defects in the argument relegates it to the status of a "whims of fate" argument relying on the remaining proposition that Prisoner was without an attorney from at least May 31 to July 3.[10] Unlike Shakespeare's epithet, "Let

7. *Ross v. Moffitt*, 1974, 417 U.S. 600, 619, 94 S.Ct. 2437, 2448, 41 L.Ed.2d 341, 356.

8. Florida's brief does not explicitly state that Prisoner was without counsel for the entire thirty-day period. However, to argue no duty to appoint counsel for discretionary review under *Moffitt's* facts implicitly assumes this fact. Otherwise, the State must address the applicability of *Moffitt* in the context of an attorney's duties on termination or withdrawal. As the facts of Prisoner's case indicate, this latter issue is present in this case. Also, the State's argument assumes that the court-appointed counsel had no obligations after May 31 assumed by his appointment or by agreement.

9. A prerequisite of this Court's jurisdiction is the existence of a case or a controversy which is justiciable. U.S.Const. art. III, § 2; *Aetna Life Ins. Co. v. Haworth*, 1937, 300 U.S. 227, 239-41, 57 S.Ct. 461, 81 L.Ed. 617. For this reason, federal courts refuse to consider a case or a controversy of a non-concrete or hypothetical nature. "It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an *opinion advising what the law would be upon a hypothetical state of facts*. (Emphasis added). Aetna Life Ins. Co., *supra* at 241, 57 S.Ct. 461. Under the facts extant in Prisoner's case, the "if" voussoir binding the State's argument together is hypothetical: a substitute counsel *agreed* to take Prisoner's case and *was substituted*. The result is an argument based on a nonexistent factual context. Where a concrete case exists, this Court will not and may not resolve a hypothetical case.

10. Since two essential propositions of this argument are absent, which of the attorneys should have acted during this period is not considered. It is sufficient to re-emphasize that an attorney's duty to a client does not necessarily and immediately end or begin with the discrete formality of a letter or a motion. Somewhat more passive, yet affirmative, duties may remain or arise over the client representation continuum when possible prejudice to a prisoner's case should be recognized. In this case, all counsel knew a thirty-day petitioning period existed and that Prisoner was relying on their adequate representation.

wyrd be done", adequate representation by counsel requires more than the unknown path fate provides.

Based on the foregoing, sufficient evidence in the record exists under F.R. Civ.P. 52(a) supporting the District Court's determination that Prisoner's right to petition for certiorari was frustrated denying him effective assistance of counsel.[11]

The District Court had ample basis for its order.

AFFIRMED.

11. *Webb v. Beto*, 5 Cir., 1966, 362 F.2d 105, *cert. denied*, 385 U.S. 940, 87 S.Ct. 307, 17 L.Ed.2d 219; *Smith v. Heard*, 5 Cir., 1963, 315 F.2d 692, *cert. denied*, 375 U.S. 883, 84 S.Ct. 154, 11 L.Ed.2d 113. The District Court made the following findings of fact or conclusions of law in its order:

(1) Prisoner's failure to timely petition for certiorari was not occasioned by him.

(2) The failure was occasioned by the State of Florida.

(3) Because of his indigency, Prisoner was forced to rely on court-appointed counsel.

(4) Prisoner expressed his desire to seek further review of his conviction.

(5) Failure of the State system to timely act and the resulting frustration of Prisoner's right to seek a writ of certiorari constitutes ineffective assistance of counsel denying Prisoner due process and equal protection of the laws under the Fourteenth Amendment of the United States Constitution.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

United States Court of Appeals

FIFTH CIRCUIT

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November 22,1976

TO ALL COUNSEL OF RECORD

NOV 29 1976

ATTORNEY GENERAL
MIAMI OFFICE

NO. 75-3861 - Nathaniel Pressley v. Louie L. Wainwright, etc.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By Susan M. Steward
Deputy Clerk

/sms/
cc: Mr Joel D. Rosenblatt
Mr. Bennett H. Brummer

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Supreme Court, U. S.
FILED
MAR 2 1977
MICHAEL RODAK, JR., CLERK

IN THE
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OCTOBER TERM, 1976

NO. 76-1208

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Offender
Rehabilitation,

Petitioner,

vs.

NATHANIEL PRESSLEY,

Respondent.

* * * * * * * * * * * * * * *

AMENDED APPENDIX

* * * * * * * * * * * * * * *

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APPENDIX "A"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-3861

NATHANIEL PRESSLEY,

Petitioner-Appellee,

vs.

LOUIE L. WAINWRIGHT, Secretary,
Department of Offender Rehabilitation,

Respondent-Appellant.

Appeal From The United States District
Court for the Southern District
of Florida

October 15, 1976

Before BROWN, Chief Judge, and GEWIN
and MORGAN, Circuit Judges.

JOHN R. BROWN, Chief Judge: Once more

Nathaniel Pressley's case comes before this Court for review of the District Court's disposition of this prisoner's petition for a writ of habeas corpus.[1] This time we affirm the District Court's conditional

[1] Prior to this appeal by the State of Florida, Prisoner had sought habeas relief after indirect denial-mere refusal to release Prisoner-by the Florida Supreme Court on November 28, 1972, of his writ of habeas corpus requesting to file "a belated petition for certiorari". Pressley v. Wainwright, Fla. 1972, No. 42,684. The Prisoner proceeded to petition the federal court system for a similar writ. This petition was dismissed on the merits by the District Court. Pressley v. Wainwright, S.D. Fla. 1973, No. 73-737-CIV-JE. This Court in Pressley v. Wainwright, 5th Cir., 1974, 493 F.2d 894, affirmed the dismissal based on Prisoner's failure to exhaust state remedies. In light of our opinion and subsequent to it, counsel for Prisoner filed before the Florida Supreme Court a motion for leave to file a belated petition for certiorari. By an unilluminating order the Florida Court stated: "The motion for leave to file belated application for certiorari filled by counsel for Nathaniel Pressley is denied." Pressley v. Wainwright,

grant of a writ order.[2]

[1] In succinct fashion, Prisoner was convicted in Florida of first degree murder. Because of his impecunious nature, Prisoner had court-appointed counsel for his direct appeal to the District Court of Appeals, Third District, which by a split panel

[1] Fla. 1974, No. 42,684. On March 19, 1975, Prisoner returned to the Southern District of Florida seeking habeas relief. In its order of June 30, 1975, the District Court found that the Prisoner had exhausted his state remedies and conditionally granted the writ. Pressley v. Wainwright, S.D. Fla., 1975, No. 75-420-CIV-JE. From this order, Florida appeals.

[2] The order requires the State of Florida either to allow a belated application for certiorari or to set aside the conviction and grant a new trial within a reasonable time. Under the order Florida has the option to follow either one of these alternatives.

affirmed the conviction.[3] Under Florida Appellate Rule 4.5[c][6], 32 F.S.A., to preserve review by the Florida Supreme Court, Prisoner had to file a petition for certiorari within thirty days of rendition of the applicable order, decision, or judgment of the District Court of Appeals. For Prisoner's certiorari petition, May 24, 1972, the date his motion for rehearing before the Florida District Court of Appeals was denied, is the relevant date under Rule 4.5[c][6].

On May 31, only seven days after the rehearing denial, Prisoner received a letter from his court-appointed counsel

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[3] Pressley v. State, Fla.App. 3d, 1972, 261 So.2d 522.

which informed him that he should request the Public Defender for Dade County to represent him for any future review and that the court-appointed counsel would no longer represent him.[4] On the same day, Prisoner wrote to the Public Defender requesting representation. His request was favorably received, but representation was conditioned to begin from the time that the Public Defender would be properly substituted as counsel. Between the time

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[4] The record does not indicate whether Prisoner had previously requested that his court-appointed counsel represent him for certiorari purposes and that his attorney at that instant responded with the May 31 letter. Nor does the record indicate whether the court-appointed counsel's letter was self-initiated with the two-fold purpose of informing Prisoner of his right to seek review by certiorari and the termination of their client attorney relationship for purposes of seeking such review.

from denial of the rehearing motion, May 24, and the date on which Prisoner received notice that he should request other counsel to represent him for certiorari purposes, May 31, the same day that he made such a request to the Public Defender, only seven calendar days had passed-well within the thirty day limit imposed by Rule 4.5[c][6], Fla. App. Rules, 32 F.S.A. Not until June 28, 1972, was the substitution motion filed with the Florida District Court of Appeals and the motion was not granted until July 3. Both actions were outside the thirty day limit.[5]

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[4] This Court's opinion in Pressley v. Wainwright, 5th Cir. 1974, 493 F.2d 895, however, indicates that the court-appointed counsel was aware of Prisoner's desire prior to the May 31 letter.

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[5] Again, the record is conspicuously absent any factors elucidating the reason-or lack of-for this delay.

[2, 3] Despite the record's silence regarding the reason for failure to file the motion for substitution and, more importantly, to protect Prisoner's right to seek certiorari, decision of this dispute does not rest with this silence or with an awakening burst of explanations that have not come forth. The mere failure to act is sufficient. Clearly, Prisoner timely indicated his intention to seek review by the Florida Supreme Court. Within the fateful deadline imposed by Rule 4.5[c][6], both the court-appointed counsel and the Public Defender were cognizant of Prisoner's desire and the time constraint. In contrast, Prisoner was unaware of this filing time and was relying on the respective attorneys to complete the

substitution of counsel and to protect his right to request a writ of certiorari.[6]

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[6] This Court does not address the question of which attorney or attorneys bore the responsibility to timely complete the substitution of counsel, to protect Prisoner's right to seek review of his conviction, or both. During the time this case was before the Florida Courts, the Code of Ethics, Rule B, 32 F.S.A. regulated practice of attorneys in Florida. This Code promulgated by the Florida Supreme Court indicates that counsel for an indigent prisoner should "always exert his best efforts in his [client's] behalf" and that an attorney should not withdraw from representation of the unfinished task "... to the detriment of his client except for reasons of honor or self-respect." See Fla.Code of Ethics, Rule B subd. 4, subd. 44, 32 F.S.A. Similarly, one who agrees to undertake the task of petitioning the Florida Supreme Court for a writ of certiorari makes a hollow commitment when he does not exercise care to preserve that right. From training and reason, the parameter of a vigilant lawyer's responsibility is apparent

In all events, failure of either or both was state action sufficient under Fitzgerald v. Estelle, 5th Cir. 1974, 505 F.2d 1334 (en banc), overruling, 1973, 479 F.2d 420.

From this background, the state's brief creates an argument using as its base Ross v. Moffitt,[7] in which the Supreme Court held that Moffitt ". . .was denied no rights secured by the Federal Constitution when North Carolina refused to provide counsel to aid him in obtaining discretionary appellate review." The keystone of this argument is the statement that "if" Prisoner's motion to substitute counsel had been denied, he would have been in the same situation as Moffitt. With these two structural points identified, the construction of the state's theory proceeds by arguing that no later than from the time Prisoner received notice of his court-appointed counsel's intention

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[7] Ross v. Moffitt, 1974, 417 U.S. 600, 619, 94 S.Ct. 2437, 2448, 41 L.Ed.2d 341, 356.

to withdraw from further representation, May 31, until the completed substitution of counsel on July 3, Prisoner was without an attorney. As a consequence, regardless of the substitution of counsel motion on June 28, Prisoner's predicament is identical to Moffitt's: he was without counsel during the filing time and no duty to appoint counsel existed on the state of Florida for discretionary review.[8]

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[8] Florida's brief does not explicitly state that Prisoner was without counsel for the entire thirty-day period. However, to argue no duty to appoint counsel for discretionary review under Moffitt's facts implicitly assumes this fact. Otherwise, the State must address the applicability of Moffitt in the context of an attorney's duties on termination or withdrawal. As the facts of Prisoner's case indicate, this latter issue is present in this case. Also, the State's argument assumes that the court-appointed counsel had no obligations after May 31 assumed by his appointment or by agreement.

[4, 5] As an arch falling when its keystone is removed, likewise, the State's argument fails. Because Prisoner's motion to substitute was granted, the binding together factor of this argument is nonexistent.[9]

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[9] A prerequisite of this Court's jurisdiction is the existence of a case or a controversy which is justiciable. U.S. Const. art. III, § 2; Aetna Life Ins. Co. v. Haworth, 1937, 300 U.S. 227, 239-41, 57 S.Ct. 461, 81 L.Ed. 617. For this reason, federal courts refuse to consider a case or a controversy of a non-concrete or hypothetical nature. "It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. (Emphasis added). Aetna Life Inc. Co., supra at 241, 57 S.Ct. 461. Under the facts extant in Prisoner's case, the "if" voussoit binding the State's argument together is hypothetical: a substitute counsel agreed to take Prisoner's case and was substituted. The result is an argument based on a nonexistent factual context. Where a concrete case exists, this Court will not and may not resolve a hypothetical case.

Furthermore, the base of the argument gives way under close scrutiny. No issue regarding failure to provide discretionary review exists. The record indicates that Prisoner's court-appointed attorney recommended that he ask the Public Defender to undertake his representation and that the Public Defender agreed to do so within the thirty-day period in question. Realization of these two defects in the argument relegates it to the status of a "whims of fate" argument relying on the remaining proposition that Prisoner was without an attorney from at least May 31 to July 3.[10] Unlike Shakespeare's

[10] Since two essential propositions of this argument are absent, which of the attorneys should have acted during this period is not considered. It is sufficient to re-emphasize that an attorney's duty to a client does not necessarily and immediately

epithet, "Let wyrd be done", adequate representation by counsel requires more than the unknown path fate provides.

Based on the foregoing, sufficient evidence in the record exists under F.R. Civ.P. 52(a) supporting the District Court's determination that Prisoner's right to petition for certiorari was

[10] end or begin with the discrete formality of a letter or a motion. Somewhat more passive, yet affirmative, duties may remain or arise over the client representation continuum when possible prejudice to a prisoner's case should be recognized. In this case, all counsel knew a thirty-day petitioning period existed and that Prisoner was relying on their adequate representation.

frustrated denying him effective assistance of counsel.[11]

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[11] Webb v. Beto, 5th Cir., 1966, 362 F.2d 105, cert. denied, 385 U.S. 940, 87 S.Ct. 307, 17 L.Ed.2d 219; Smith v. Heard, 5th Cir. 1963, 315 F.2d 692, cert. denied, 375 U.S. 883, 84 S.Ct. 154, 11 L.Ed.2d 113. The District Court made the following findings of fact or conclusions of law in its order:

(1) Prisoner's failure to timely petition for certiorari was not occasioned by him.

(2) The failure was occasioned by the State of Florida.

(3) Because of his indigency, prisoner was forced to rely on court-appointed counsel.

(4) Prisoner expressed his desire to seek further review of his conviction.

(5) Failure of the State system to timely act and the resulting frustration of Prisoner's right to seek a writ of certiorari constitutes ineffective assistance of counsel denying Prisoner due process and equal protection of the laws under the Fourteenth Amendment of the United States Constitution.

The District Court had ample basis for its order.

AFFIRMED.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

EDWARD W. WADSWORTH
Clerk
November 22, 1976

Tel. 504-589-6514
600 Camp Street
New Orleans, La. 70130

TO ALL COUNSEL OF RECORD

NO. 75-3861 - Nathaniel Pressley v.
Louie L. Wainwright

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By: Susan M. Gravois
Deputy Clerk

/smg
cc: Mr. Joel D. Rosenblatt
Mr. Bennett Brummer

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 76-1208

LOUIE L. WAINWRIGHT,
Secretary, Florida Department
of Offender Rehabilitation,

Petitioner,

vs.

NATHANIEL PRESSLEY,

Respondent.

ON PETITION FOR WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Public Defender
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Miami, Florida 33125
(305) 547-4922

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IN THE SUPREME COURT OF THE UNITED STATES

CCTOBER TERM, 1976

NO. 76-1208

LOUIE L. WAINWRIGHT, etc.,

Petitioner,

vs.

NATHANIEL PRESSLEY,

Respondent.

ON PETITION FOR WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI

QUESTION PRESENTED

WHETHER THE COURTS BELOW PROPERLY GRANTED HABEAS CORPUS RELIEF WHERE THE APPLICANT HAD BEEN DENIED THE RIGHT TO FILE A PETITION FOR CERTIORARI IN THE SUPREME COURT OF FLORIDA AS A DIRECT CONSEQUENCE OF THE OPERATION OF A FLORIDA RULE OF COURT COUPLED WITH THE FAILURE OF APPLICANT'S COURT-APPOINTED COUNSEL TO TIMELY INVOKE THE CERTIORARI JURISDICTION OF THE SUPREME COURT OF FLORIDA, AND PETITIONER HAD THUS BEEN DEPRIVED OF DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS.

INTRODUCTION

The Secretary of Florida's Department of Offender Rehabilitation has requested this honorable Court to issue its writ of certiorari to review the affirmance by the court below of a judgment granting habeas corpus relief to a state prisoner. Unless otherwise indicated, the term "petitioner" will be used herein to refer to the state prisoner in the context of the litigation in the courts below.

STATEMENT OF THE CASE

On February 17, 1970, the petitioner was charged by indictment with the offense of murder in the first degree. (R. 24).

The petitioner was adjudged insolvent and the court appointed counsel to represent him. The petitioner was tried and the jury returned a verdict of guilty of murder in the first degree with a recommendation of mercy. The petitioner was adjudged guilty and sentenced to life imprisonment in the state penitentiary. (R. 25).

The petitioner was adjudged insolvent for the purpose of appeal and the court appointed counsel to represent him. (R. 26). In an opinion filed on May 2, 1972, the District Court of Appeal of Florida, Third District, affirmed the conviction. (R. 27-34, 116). The Honorable Tillman Pearson dissented, and cited two Florida appellate decisions in support of his conclusion that the trial court had committed reversible error. (R. 34). A petition for rehearing was denied on May 24, 1972, and the mandate issued forthwith. (R. 35).

The petitioner, on May 31, 1972, wrote to the Public Defender, Dade County, Florida, at the suggestion of his court-appointed counsel, and requested that the Public

Defender obtain the petitioner's records from his court-appointed counsel and seek review of the District Court's decision. (R. 36). The Public Defender advised the petitioner that certiorari would be sought on his behalf. (R. 18, 116).

Petitioner's court-appointed counsel delivered the petitioner's files to the Public Defender. A stipulation for substitution of counsel was entered between the petitioner's court-appointed counsel and the Public Defender. (R. 38). On June 28, 1972, the stipulation was filed in the state appellate court in support of a motion to substitute counsel. (R. 37). The motion and stipulation requested that court-appointed counsel be allowed to withdraw, and that the Public Defender be substituted as counsel for petitioner for the purpose of filing a petition for a writ of certiorari in the Supreme Court of Florida on behalf of the petitioner. (R. 37, 38). On July 3, 1972, the state appellate court entered its order accepting the aforementioned stipulation and appointing the Public Defender to represent the petitioner. (R. 39).

Neither petitioner's court-appointed counsel nor the Public Defender filed a timely petition for a writ of certiorari in the Supreme Court of Florida.[1]

On August 9, 1972, the Public Defender filed a petition for a writ of habeas corpus in the Supreme Court of Florida requesting as relief solely that the Court "permit the filing of a belated petition for certiorari." Pressley v. Wainwright, Case # 42, 684. (R. 40). This petition was denied on November 28, 1972. (R. 43).

[1]The respondent has noted that the petitioner's co-defendant filed a petition for writ of certiorari which was denied by the Supreme Court of Florida. Petition at 3. The co-defendant's case is not in any way relevant to this case. The co-defendant's appeal did not involve the same issues as were presented by the petitioner's appeal, and resulted in a unanimous affirmance by the same appellate panel which split regarding the disposition of the petitioner's case. Compare Rhymes v. State, 261 So.2d 527 (Fla. App. 3d 1972); Pressley v. State, 261 So.2d 522 (Fla. App. 3d 1972).

On April 30, 1973, the petitioner filed an application for habeas corpus relief in the United States District Court for the Southern District of Florida. The federal petition was based upon essentially the same grounds as were contained in the state habeas petition. This petition was denied on the merits.

The petitioner appealed this denial to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit affirmed the denial of the federal habeas petition on the ground that state remedies had not been exhausted. Pressley v. Wainwright, 493 F.2d at 894, 895 (5th Cir. 1974); (R. 117).

In light of the Fifth Circuit's opinion, the petitioner, on June 12, 1974, filed a motion for leave to file a belated application for certiorari in the Supreme Court of Florida. (R. 44-47). On July 22, 1974, that motion was denied. (R. 48).

On March 19, 1975, the petitioner returned to federal court and filed the petition sub judice. (R. 1-48). The district court issued its rule to show cause and the respondent filed a motion to dismiss and memorandum of law. (R. 49, 53-110). The positions taken by the petitioner and respondent were similar, if not identical, to the positions taken in the initial habeas proceedings. The petitioner filed a second memorandum in support of his petition and in reply to the motion to dismiss. (R. 111-115).

On June 30, 1975, the district court entered an order granting the petitioner habeas corpus relief. (R. 116-118). The district court made the following findings of fact and conclusions of law:

a. The Fifth Circuit, on appeal, had affirmed the initial habeas judgment against the petitioner on exhaustion

grounds. (R. 117).

b. The petitioner had utilized one of the alternatives for exhaustion of state remedies suggested by the Fifth Circuit and had adequately exhausted his state remedies. (R. 117).

c. The Fifth Circuit had elucidated the petitioner's claim and the district court had not fully understood the claim when it was initially presented. (R. 117).

d. "States are not required to establish avenues of appellate review, but once established, these avenues must be kept free of unreasonable distinction that can only impede open and equal access to the Courts." (R. 118).

e. "Petitioner's failure to file the certiorari petition within the time prescribed by law was not occasioned by him. It was occasioned by the State of Florida. Because of his indigency petitioner was forced to rely upon court-appointed counsel. Petitioner expressly manifested his desire to avail himself of the opportunity for the further review of his state court conviction and the failure of the state system to timely act and the resultant frustration of petitioner's right to petition for certiorary (sic) constitutes ineffective assistance of counsel and denied petitioner due process of law and the equal protection of laws as guaranteed by the Fourteenth Amendment of the United States Constitution." (R. 118).

Accordingly, the district court ordered that the State of Florida permit the petitioner to belatedly apply for certiorari review, or in the alternative set aside the petitioner's conviction and grant him a new trial. (R. 118). The district court stated that, if the State failed to comply, the court would be obligated to release the petitioner from the custody resulting from the adjudication and sentence imposed in this case. (R. 118).

On July 10, 1975, the respondent moved for rehearing, which was denied. (R. 119-122, 123). The respondent then appealed to the United States Court of Appeals for the Fifth Circuit. (R. 124).

The Fifth Circuit affirmed the grant of habeas corpus relief. Pressley v. Wainwright, 540 F.2d 818. After reviewing the facts and circumstances of the case, the court below rejected as hypothetical the argument which Florida again relies upon in the petition before this Court:

> The keystone of this argument is the statement that "if" Prisoner's motion to substitute counsel had been denied, he would have been in the same situation as Moffitt. With these two structural points identified, the construction of the state's theory proceeds by arguing that no later than from the time Prisoner received notice of his court-appointed counsel's intention to withdraw from further representation, May 31, until the completed substitution of counsel on July 3, Prisoner was without an attorney. As a consequence, regardless of the substitution of counsel motion on June 28, Prisoner's predicament is identical to Moffitt's: He was without counsel during the filing time and no duty to appoint counsel existed on the state of Florida for discretionary review.
>
> As an arch falling when its keystone is removed, likewise, the State's argument fails. Because Prisoner's motion to substitute was granted, the binding together factor of this argument is nonexistent. Furthermore, the base of the argument gives way under close scrutiny. No issue regarding failure to provide discretionary review exists. The record indicates that Prisoner's court-appointed recommended that he ask the Public Defender to undertake his representation and that the Public Defender agreed to do so within the thirty day period in question. Realization of these two defects in the argument relegates it to the status of a "whims of fate" argument relying on the remaining proposition that Prisoner was without an attorney from at least May 31 to July 3. Unlike Shakespear's epithet "Let wyrd be done", adequate representation by counsel requires more than the unknown path fate provides. 540 F.2d at 820-821. (Footnotes omitted.)

The findings of fact and conclusions of law which were the basis for the relief afforded by the district court were outlined by the court below as follows:

> (1) Prisoner's failure to timely petition for certiorari was not occasioned by him.
> (2) The failure was occasioned by the State of Florida.
> (3) Because of his indigency, Prisoner was forced to rely on court-appointed counsel.
> (4) Prisoner expressed his desire to seek further review of his conviction.
> (5) Failure of the State system to timely act and the resulting frustration of Prisoner's right to seek a writ of certiorari constitutes ineffective assistance of counsel denying Prisoner due process and equal protection of the laws under the Fourteenth Amendment of the United States Constitution. 540 F.2d at 821 n. 11.

In affirming the judgment of the district court, the Fifth Circuit found that the record reflected sufficient evidence to support the district court's determination that the petitioner-appellee had been denied effective assistance of counsel. 540 F.2d at 821.

ARGUMENT

THE COURTS BELOW PROPERLY GRANTED HABEAS CORPUS RELIEF WHERE THE PETITIONER HAD BEEN DENIED THE RIGHT TO FILE A PETITION FOR CERTIORARI IN THE SUPREME COURT OF FLORIDA AS A DIRECT CONSEQUENCE OF THE OPERATION OF A FLORIDA RULE OF COURT COUPLED WITH THE FAILURE OF PETITIONER'S COURT-APPOINTED COUNSEL TO TIMELY INVOKE THE CERTIORARI JURISDICTION OF THE SUPREME COURT OF FLORIDA, AND PETITIONER HAD THUS BEEN DEPRIVED OF DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS.

Reasonable access to the courts is a constitutional imperative. It is a fundamental principle that "access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed." Johnson v. Avery, 393 U.S. 483, 485 (1969). Hooks v. Wainwright, 352 F.Supp. 163, 168 (M.D. Fla. 1972).

> [I]t is clear that unless an indigent inmate can reach the very threshold of the courts, all of the normal guarantees of due process do not come into play. Although he may have a claim which would entitle him to relief, absent the invocation of the judicial machinery the potential relief is merely a hollow promise. Thus, the inadequacy and insufficiency of the legal services provided indigent inmates effectively denies them the due process of law.

As repeatedly recognized by the court of appeals, the instant claim arises from a denial by the State of petitioner's right to file a petition for a writ of certiorari in the Supreme Court of Florida. Pressley v. Wainwright, 540 F.2d 818; 493 F.2d at 896. This denial is a direct consequence of the operation of a Florida rule of court coupled with the failure of petitoner's court-appointed counsel to timely act on his client's behalf.

A. The Application Of Florida Appellate Rule 4.5 By The Supreme Court Of Florida So As To Foreclose Petitioner's Right To Petition For Certiorari Review Deprived Petitioner Of Due Process And Equal Protection As Guaranteed By The Fourteenth Amendment To The Constitution Of The United States.

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The jurisdiction of the Supreme Court of Florida to review decisions of district courts of appeal is established by Article V of the Florida Constitution. Florida Appellate Rules 2.1(a)(5)(b) and 4.5(c)(6), promulgated by the Florida Supreme Court, parallel the provisions of Article V.

Article V § 4(2) of the Florida Constitution (1885), which was in effect at the time of the petitioner's application, provided in pertinent part:

> The supreme court may review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, or that passes upon a question certified by the district court of appeal to be of great public interest, or that is in direct conflict with a decision of another district court of appeal or of the supreme court on the same point of law, and may issue writs of certiorari to commissions established by law.[2]

Rule 4.5(c)(6), Fla.App.R., provides in pertinent part:

> Where any decision of a district court of appeal (1) affects a class of constitutional or state officers, or (2) passes upon a question certified by such district court to be of great public interest, or (3) is in direct conflict with a decision of another district court of appeal or of the Supreme Court on the same point of law, petition may be filed with the Supreme Court to issue a writ of certiorari to review such decision.

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[2]Article V was amended effective January 1, 1973. Section 3(b)(3) relating to certiorari jurisdiction now provides for review by the Supreme Court of a decision which conflicts with "a decision of any district court." This modification does not, however, have any bearing on the outcome of the case at bar.

> The petition for certiorari under this rule shall be filed in the Supreme Court within 30 days from the rendition of the order, decision or judgment of the district court of appeal.
>
> * * *
>
> The Supreme Court shall consider the petition . . . and if the Court determines that it has jurisdiction, the said petition shall be granted; otherwise the same shall be denied or dismissed.

Thus, the Florida Appellate Rules allow a party to file a petition for a writ of certiorari in the Florida Supreme Court to review "any decision of a district court of appeal", provided that such petition is filed with the thirty day time limit. The right is absolute except for this time limitation.

The Florida Appellate Rules do not establish a prerequisite showing of jurisdiction or merit to the filing of a petition for a writ of certiorari.[3] If, after consideration of a petition, the Supreme Court of Florida finds itself to be without jurisdiction or the petition to be without merit, the petition is dismissed or the writ is discharged. Fla.App.R. 4.5 (c)(6). See, e.g., State v. Reynolds, 238 So.2d 600 (Fla. 1970).

The State's denial of petitioner's right to file a petition for certiorari review due to the failure of his court-appointed counsel to file within the thirty day limit established by a Florida rule of court constituted a violation of the petitioner's right to due process of law and equal protection of the laws as guaranteed by the Fourteenth Amendment

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[3]The petitioner's attempt to invoke the certiorari jurisdiction of the Supreme Court of Florida was in "good faith." 493 F.2d 895. The dissent to the affirmance of petitioner's conviction expressly sets forth two decisions of other district courts of appeal, which decisions, in the opinion of the dissenting judge, conflicted with the affirmance. Thus, the decision itself indicates that the state certiorari petition would have been meritorious. Pressley v. State, supra at 527.

to the Constitution of the United States.[4]

The present case is controlled by a long line of decisions of the Supreme Court of the United States in which the Court held constitutionally invalid a wide range of state procedures which denied indigent defendants the benefit of an existing system of appellate review. In Lane v. Brown, 372 U.S. 477 (1963), the Court held violative of the Equal Protection Clause, an Indiana procedure which permitted the public defender at will to deprive an indigent of the right to appeal from the denial of a writ of coram nobis. The Court in Lane, reviewed its previous decisions:

> In Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891, the Court held that a State with an appellate system which made available trial transcripts to those who could afford them was constitutionally required to provide "means of affording adequate and effective appellate review to indigent defendants." Id., at 20, 76 S,Ct. 591. "Destitute defendants," the Court held, "must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." Id., at 19, 76 S.Ct. 591. In Burns v. Ohio, 360 U.S. 252, 79 S.Ct. 1164, 3 L.Ed.2d 1209, involving a $20 fee for filing a motion for leave to appeal a felony conviction to the Supreme Court of Ohio, this Court reaffirmed the Griffin doctrine, saying that "once the State chooses to establish appellate review in criminal cases, it may not foreclose indigents from access to any phase of that procedure because of their poverty. This principle is no less applicable where the State has afforded an indigent defendant access to the first phase of its appellate procedure but has effectively foreclosed access to the second phase of that procedure solely because of his indigency." Id., at 257, 79 S.Ct. 1168. In Smith v.

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[4]Cf. Braswell v. Wainwright, 463 F.2d 1148 (5th Cir. 1972).

Bennett, 365 U.S. 708, 81 S.Ct. 895, 6 L.Ed.2d 39, the Court made clear that these principles were not to be limited to direct appeals from criminal convictions, but extended alike to state post-conviction proceedings. "Respecting the State's grant of a right to test their detention," the Court said, "the Fourteenth Amendment weighs the interests of rich and poor criminals in equal scale, and its hand extends as far to each." Id., at 714, 81 S.Ct. 898. In Eskridge v. Washington Prison Board, 357 U.S. 214, 78 S.Ct. 1061, 2 L.Ed.2d 1269, the Court held invalid a provision of Washington's criminal appellate system which conferred upon the trial judge the power to withhold a trial transcript from an indigent upon the finding that "justice would not be promoted . . . in that defendant has been accorded a fair and impartial trial, and in the Court's opinion no grave or prejudicial errors occurred therein," Id., at 215, 78 S.Ct. 1062. There it was said that "[t]he conclusion of the trial judge that there was no reversible error in the trial cannot be an adequate substitute for the right to full appellate review available to all defendants in Washington who can afford the expense of a transcript." Id., at 216, 78 S.Ct. 1062.

The present case falls clearly within the area staked out by the Court's decisions in Griffin, Burns, Smith and Eskridge. To be sure, this case does not involve, as did Griffin, a direct appeal from a criminal conviction, but Smith makes clear that the Griffin principle also applies to state collateral proceedings, and Burns leaves no doubt that the principle applies even though the State has already provided one review on the merits.

In Eskridge the Court held constitutionally invalid a provision which permitted a trial judge to prevent an indigent from taking an effective appeal. The provision before us confers upon a state officer outside the judicial system power to take from an indigent all hope of any appeal at all. Such a procedure, based on indigency alone does not meet constitutional standards. 372

U.S. at 483- 485, 83 S.Ct. at 772-773. (Emphasis added.)

See also Anders v. California, 386 U.S. 783 (1967); Entsminger v. Iowa, 386 U.S. 748 (1967); Roberts LaVallee, 389 U.S. 40 (1967).

Petitioner's right to file a petition for a writ of certiorari in the Florida Supreme Court stands on no less footing than Smith's right of access to state post-conviction proceedings and Lane's access to appellate review thereof, Burn's right of access to the second phase of state appellate procedure, and Griffin's and Eskridge's right to a trial transcript for appellate review.

On May 31, 1972, following affirmance of petitioner's conviction by the District Court of Appeal of Florida on May 24, 1972, and within the thirty day time period provided by Florida Appellate Rule 4.5, petitioner wrote to the Public Defender for the Eleventh Judicial Circuit of Florida, and requested that Public Defender represent him in seeking review of the District Court's decision. (R. 36). The letter stated that the petitioner had been referred to the Public Defender for this purpose by his court-appointed counsel. Petitioner had been previously adjudged insolvent for the purpose of appeal and, therefore, had to rely upon court-appointed counsel in order to take advantage of the opportunity to have the decision of the District Court reviewed by the Supreme Court of Florida. (R. 26). The Public Defender advised the petitioner that certiorari would be sought on his behalf. (R. 18, 116).

It was not until after the thirty day limit established by Rule 4.5 had elapsed that the Public Defender substituted as counsel for petitioner by order of the Distrcit Court of Appeal. (R. 39, 117). No petition for a writ of certiorari had been filed by petitioner's court-appointed counsel or by the Public Defender within the thirty day period. (R. 9, 41, 117).

Petitioner's failure to file the certiorari petition within the time provided by law was occasioned solely by the inaction of petitioner's court-appointed counsel, upon whom petitioner was forced to rely because of his indigency, despite petitioner's expressly manifested desire to avail himself of the opportunity for further state court review of his conviction. (R. 15, 17, 118). See also 540 F.2d at 821 n. 11; 493 F.2d at 895.

The Public Defender initially undertook to vindicate petitioner's frustrated right to certiorari review of his conviction by filing an original petition for a writ of habeas corpus in the Florida Supreme Court. This remedy was invoked in accordance with the decision of the Supreme Court of Florida in Baggett v. Wainwright, 229 So.2d 239 (1969), which expressly adopted this method as the appropriate means to secure belated appellate review which has been frustrated by state action. See also Thompson v. Dilley, 275 So.2d 234 (Fla. 1973). Subsequent to and in accordance with the Fifth Circuit's ruling in this cause, the petitioner filed a motion for leave to file a belated application for certiorari in the Supreme Court of Florida. This motion met the same fate as the petitoner's initial request to that Court.

Thus, the application by the Supreme Court of Florida of the thirty day limitation on filing contained in Rule 4.5 under the circumstances sub judice constituted a denial of the petitoner's right to due process of law and equal protection of the laws.

B. The Failure Of Petitoner's Court-Appointed Counsel To Timely Invoke The Certiorari Jursidiction Of The Supreme Court Of Florida, After Agreeing To Do So With The Petitioner, Rendered Said Counsel's Assistance Ineffective And Deprived The Petitioner Of Due Process Of Law And Equal Protection Of The Laws.

Indigent defendants in criminal proceedings are constitutionally entitled to effective assistance from

state-appointed counsel. Anders v. California, supra; Douglas v. California, 372 U.S 353 (1963).

It is well-established that the failure of counsel to timely invoke a court's appellate jurisdiction, or place his client in a position to do so, renders his assistance ineffective and deprives the accused of his constitutional rights. Lumpkin v. Smith, 439 F.2d 1084 (5th Cir. 1971).

In Hall v. Wainwright, 441 F.2d 391 (5th Cir. 1971), the court affirmed the issuance of a writ of habeas corpus where petitioner's court-appointed counsel failed to file a timely notice of appeal. The court noted that the failure of the Public Defender, a state agency, to act "constituted state action which effectively denied to the petitioner his constitutionally protected right to appeal." Id. at 393.

In Atilus v. United States, 406 F.2d 694, 697 (5th Cir. 1969), the court noted that the failure of non-appointed counsel to notice an appeal is tantamount to denying an accused the right to counsel at a vital state of the proceedings:

> [W]here the trial ends with appointed counsel failing to take the action desired by the accused by filing a notice of appeal and the convicted person is therefore actually without the aid of counsel when the statutory time of appeal expires, this court has had no difficulty in remedying this defect by permitting a late filing.

In Lumpkin v. Smith, supra, the court reversed a denial of a state prisoner's petition for habeas corpus relief on the basis tht the petitioner had been denied the effective assistance of counsel. The court noted that it was well-established that court-appointed counsel must advise a defendant of "his right to appeal, the procedure and time limits involved, and of his right to appointed counsel on appeal." Id. at 1085.

In the instant case, petitioner had court-appointed counsel to represent him both a trial and on appeal. Court-appointed counsel then withdrew from the case, and the Public Defender was simultaneously appointed to represent the petitioner. This substitution of counsel was for the express purpose of filing a petition for a writ of certiorari in the Supreme Court of Florida. The Public Defender had advised petitioner that a petition would be filed on his behalf. Thus, petitioner's reliance on the Public Defender coupled with counsel's failure to timely invoke the jurisdiction of the Supreme Court of Florida effectively denied the petitioner his right to petition for a writ of certiorari. In Anders v. California, supra at 739-741, and Lane v. Brown, supra at 485, this Court declared that court-appointed counsel may not directly deprive an indigent defendant of his right to appellate review. See also Entsminger v. Iowa, supra at 752. Logic, as well as the Constitution, requires the conclusion that court-appointed counsel may not constitutionally do indirectly that which he may not do directly.

The failure of petitioner's court-appointed counsel to timely act and the resultant frustration of petitioner's otherwise absolute right to petition for certiorari review constituted ineffective assistance of counsel and denied petitioner due process of law and the equal protection of the laws as guaranteed by the Fourteenth Amendment of the United States Constitution. (R. 118).

The consequences of petitioner's counsel's failure to timely invoke the certiorari jurisdiction of the Supreme Court of Florida are as serious as those flowing from counsel's failure to timely note appeals in Hall and Atilus. Therefore, the relief afforded the petitioner by the court below, which

relief is equivalent to that granted in Hall and Atilus, is entirely appropriate.

C. The Failure Of The State To Provide A Means Of Relieving The Petitioner From The Consequences Of Court-Appointed Counsel's Failure To Timely Perfect Petitioner's Right To Petition For Certiorari Review, While Providing Relief From Similar Derelictions Of Counsel Relating To Direct Appeals And Appeals From Denials Of Post-Conviction Relief, Deprived The Petitioner Of Equal Protection Of The Laws.

The petitioner's equal protection claim, in essence, was that Florida must provide a means to relieve him from the consequences of court-appointed counsel's failure to timely perfect petitioner's right to seek certiorari review because Florida provided relief from similar derelictions of counsel relating to direct appeals and appeals from denials of post-conviction motions. The federal district court, in its order granting habeas relief, held that the petitioner had been denied equal protection of the laws, as well as due process. In affirming the district court, the Fifth Circuit only discussed the due process factor, but reiterated the two bases relied upon by the district court. 540 F.2d at 821 n. 11.

In addition to the federal courts, the Supreme Court of Florida has recognized and applied the Douglas principle, and established that habeas corpus is the appropriate remedy for the deprivation of indigent defendants' appellate rights by the State. Baggett v. Wainwright, 229 So.2d 239, 241 (Fla. 1969); Powe v. State, 216 So.2d 446 (Fla. 1968). See also State v. Wooden, 246 So.2d 755 (Fla. 1971). Although these three cases relate to belated direct appeals, Florida courts have declared that the same procedure is appropriate where the defendant has been deprived of an appeal from post-conviction proceedings. Flores v. Wainwright, 240 So.2d 816 (Fla. App. 2d 1970); O'Malley v. Wainwright, 237 So.2d 813, 817 (Fla. App. 2d 1970).

The State has established a means of relieving defendants from the consequences of court-appointed counsel's failure to timely perfect their right to direct appeals and appeals from denials of post-conviction petitions pursuant to Fla.R.Crim.P. 3.850. However, the State has refused to relieve the petitioner from the consequences of his court-appointed counsel's failure to timely perfect the petitioner's right to petition for certiorari review. This refusal by the State creates two classes of defendants seeking appellate review of criminal proceedings: 1) those defendants seeking relief from the ineffective assistance of counsel resulting in the denial of a direct appeal or an appeal from post-conviction proceedings and, 2) those defendants seeking relief from the ineffective assistance of counsel resulting in the denial of certiorari review. The State discriminates by withholding habeas corpus relief, in the form of belated appellate review, from the second class while extending such relief to the first.

In that these classifications touch upon the fundamental right of effective assistance of counsel, and right of access to courts, the classifications must promote a compelling state interest. Mayer v. City of Chicago, 404 U.S. 189 (1971); Cipriano v. City of Houma, 395 U.S 701 (1969); Shapiro v. Thompson, 394 U.S. 618 (1969); King v. New Rochelle Municipal Housing Authority, 442 F.2d 646 (2d Cir. 1971). Cf. Roe v. Wade, 410 U.S. 113 (1973). However, these classifications fail to promote any legitimate state interest whatsoever.

Even if the less stringent equal protection standard of rationality were applicable in the case at bar, these classifications would still fail to pass constitutional muster. In Rinaldi v Yeager, 384 U.S 305 (1966), this Court struck down a New Jersey statute which required that an incarcerated indigent

defendant reimburse the state for the cost of a trial transcript, but which statute did not impose this requirement upon those defendants who paid a fine or were placed on probation. In striking down the statute, the Court noted that the Equal Protection Clause requires "some rationality in the nature of the class singled out" and that "distinctions that are drawn have 'some relevance to the purpose for which the classification is made'." Id. at 309. Clearly these standards are not met when the State requires applicants for certiorari review to bear the consequences of the deprivation of a fundamental right, such as the right to the effective assistance of counsel, while relieving applicants for direct appeal or post-conviction appellate review of this burden. This discrimination is not rational and bears no relationship to any constitutionally acceptable purpose. See also Eisenstadt v. Baird, 405 U.S 438, 446-447, n. 7 (1972); Williams v. Illinois, 399 U.S. 235 (1970).

The claim sub judice is a direct result of precisely the type of "unreasoned distinction" to which the Court referred in Rinaldi, supra at 310-311:

> This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts. Griffin v. People of State of Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891; Douglas v. People of State of California, 372 U.S. 353, 83 S.Ct. 768, 9 L.Ed.2d 892; Draper v. State of Washington, 372 U.S. 487, 83 S.Ct. 774, 9 L.Ed.2d 899.

The relief afforded the petitioner by the courts below is appropriate because it had the salutary effect of eliminating this invidious discrimination and infringement upon the

petitioner's fundamental rights.

D. Florida's Argument That The Courts Below Erred In Granting Habeas Relief Because The Record Fails To Establish A Deprivation Of A Constitutional Right And That The Decision Of The Court Below Conflicts With Ross v. Moffitt Is Without Foundation In Law Or Fact.

In contrast with the Secretary's argument, this case presents no issue regarding the right to the appointment of counsel or the failure of counsel to advise his client of the possibility of discretionary review. Petition at 9-10. The Secretary recognizes that, in contrast with Moffitt's case, counsel was appointed for the petitioner. Petition at 7. The Secretary, however, attempts to dismiss this crucial fact by stating that this difference creates no distinction at all.[5] Petition at 7.

The findings of fact and conclusions of law which were the basis for the relief afforded by the district court were outlined by the court below as follows:

> (1) Prisoner's failure to timely petition for certiorari was not occasioned by him.
> (2) The failure was occasioned by the State of Florida.
> (3) Because of his indigency, Prisoner was forced to rely on court-appointed counsel.
> (4) Prisoner expressed his desire to seek further review of his conviction.
> (5) Failure of the State system to timely act and the resulting frustration of Prisoner's right to seek a writ of certiorari constitutes ineffective assistance of counsel denying Prisoner due process and equal protection of the laws under the Fourteenth Amendment of the United States Constitution. 540 F.2d at 821 n. 11.

[5]The petition is misleading insofar as it indicates that Moffitt's counsel was unable to secure "permission to file" a petition for certiorari. Petition at 9. Moffitt reflects that the North Carolina courts refused to provide appointed counsel to represent Moffitt on certiorari. 417 U.S. at 600, 603-604 (1974).

In affirming the judgment of the district court, the court below found that the record reflected sufficient evidence to support the district court's determination that the petitioner-appellee had been denied effective assistance of counsel. 540 F.2d at 821.

This case involves a question of effective assistance of counsel, rather than a question of the right to the appointment of counsel. The petitioner was represented by court-appointed counsel at all times relevant to the case sub judice. As averred and demonstrated to the satisfaction of the courts below, the state trial court appointed counsel to represent the petitioner at trial and then for purposes of appeal. (R. 8, 26). Petitioner's counsel then requested the state appellate court to permit him to withdraw and to substitute the local public defender as counsel for the petitioner for the explicit purpose of filing a writ of certiorari in the Supreme Court of Florida. (R. 37-38). The state appellate court entered an order which simultaneously granted leave to withdraw and substituted the public defender as counsel for the petitioner. (R. 39). Thus, the finding of the courts below is quite adequately supported by the record.

The issue here is whether the petitioner may be deprived of his state created right to file a petition seeking to invoke the certiorari jurisdiction of the Supreme Court of Florida as a direct result of the ineffectiveness of appointed counsel and the enforcement by the Supreme Court of Florida of its procedural rules. It is the petitioner's position that the courts below properly resolved this issue in the negative. This is especially apparent in light of the assurances the petitioner received from appointed counsel that the petitioner's right to review would be protected

and exercised, and the petitioner's good faith reliance on those assurances.[6] The assistance rendered by counsel was clearly ineffective. See West v. State of Louisiana, 478 F.2d 1026, 1033 (5th Cir. 1973); MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960).

The Due Process Clause limits the circumstances under which an individual may be deprived of any entitlement, even though the entitlement may be a mere privilege. Goldberg v. Kelly, 397 U.S. 254, 262 (1970). The entitlement certainly need not be based upon a constitutional right in order to be afforded due process protection. See, e.g., Goss v. Lopez, 419 U.S. 565, 95 S.Ct. 729, 735-736 (1975); Wolff v. McDonald, 418 U.S. 539 (1974); Morrisey v. Brewer, 408 U.S. 471 (1972); Goldberg v. Kelly, supra.

"[T]here is no federal constitutional right to state appellate review of state criminal proceedings." Estelle v. Dorrough, 420 U.S. 534, 95 S.Ct. 1173, 1175 (1975). This proposition applies with equal force to direct appeals and to discretionary procedures.

Once Florida established certiorari as an avenue of appellate review, however, Florida became responsible for keeping that avenue free of unreasoned distinctions that can only impede open and equal access to the courts.[7] Cf. Rinaldi

[6] When this case was initially before the court below, that court explicitly recognized that the problem was not the fault of the petitioner, and had occurred because of a belated court order appointing counsel and despite the good faith intention of the petitioner to seek review. 493 F.2d at 895. The second time this case was before the court below, the court expressly relied upon findings of fact made by the district court, which findings reemphasize that the petitioner was without blame and the state system was responsible for the frustration of the petitioner's rights. 540 F.2d at 821 n. 11.

[7] Although Florida may not have been constitutionally obligated to provide certiorari review, it has chosen to do so. Pursuant to the Constitution of the State of Florida and the Florida Appellate Rules, the petitioner had an unconditional right to file a timely petition requesting the Supreme Court of Florida to exercise its certiorari jurisdiction. Fla. Const. Art. V § 3(b)(3); Fla.App.R. 2.1(a)(5)(b), 4.5(c).

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v. Yeager, supra at 310-311. Florida's denial of the petitioner's right to file for certiorari review through ineffective assistance of counsel, and Florida's subsequent refusal to remove the obstacles created by its rules, contrary to what the State has done in similar situations, constitutes a denial of due process and equal protection. Cf. Fitzgerald v. Estelle, 505 F.2d 1334, 1336 (5th Cir. en banc 1975).

Obstacles to appellate review which might otherwise have resulted in deprivations of due process have been the object of remedial action by both the federal and Florida courts. The Supreme Court Rules anticipate problems in this area and explicitly provide means to insure that parties are not arbitrarily denied access to the Court. The normal period in which a party may file a petition is a reasonable ninety days, compared with Florida's thirty. Supreme Court Rule 22(1). Significantly, where good cause is shown, the normal time for applying may be extended for a period not exceeding sixty days. Supreme Court Rule 22(1). See also Supreme Court Rule 22(2). Florida's rule, in contrast, is written and applied in such a rigid manner that it must from time to time arbitrarily deny a proper party access to the Supreme Court of the state.

Also, as noted by the Fifth Circuit, the Supreme Court, in Schreiner v. United States, 404 U.S. 67 (1971), remanded the case to the court of appeals with instructions to re-enter its judgment in connection with efforts to certiorari review of the judgment in the Supreme Court. 493 F.2d 894, 895 (5th Cir. 1974).

In Lacaze v. United States, 457 F.2d 1075 (5th Cir. 1972), the court exercised its supervisory power to overcome obstacles in the way of obtaining access to certiorari review in the Supreme Court of the United States. The court observed:

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> It is by no means unusual for courts to grant out-of-time relief to a defendant in order that he may be allowed to use the appellace process previously denied him. Id. at 1079.

The Fifth Circuit has in numerous cases granted habeas corpus relief to state prisoners who have been deprived of access to appellate courts by ineffective assistance of counsel. See, e.g., Daniels v. State of Alabama, 487 F.2d 887 (5th Cir. 1973); Hall v. Wainwright, 441 F.2d 391 (5th Cir. 1971); Lumpkin v. Smith, 439 F.2d 1084 (5th Cir. 1971).

The Florida courts have fashioned a remedy for the failure of court-appointed counsel to timely seek review in cases involving appeals from denials of collateral relief, as well as from denials of direct appeals. See, e.g., Baggett v. Wainwright, 229 So.2d 816 (Fla. App.2d 1970); O'Malley v. Wainwright, 237 So.2d 813 (Fla. App.2d 1970).

The grant of habeas corpus relief and affirmance by the courts below was in keeping with the well established principles recognized in these cases and was eminently correct. As this Court recently reiterated, "Regulations and practices that unjustifiably obstruct. . . the right of access to the courts are invalid." Procunier v. Martinez, 416 U.S. 396, 419 (1974).

CONCLUSION

Ross v. Moffitt held that there is no constitutional right to appointed counsel to seek post-appeal discretionary review in either a state forum or the Supreme Court of the United States. Petition at 6. The North Carolina courts had refused to provide counsel for Moffitt.

In contrast, in the instant case, counsel was appointed. The courts below have held that the assistance

rendered by counsel was ineffective and deprived your respondent of due process of law. There is no conflict whatsoever between the instant case and Moffitt.

For the foregoing reasons your respondent respectfully requests this honorable Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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